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Letter Ruling 02-1: Taxation of the Transfer of a Decedent's MA Property

June 19, 2002

You ask for a ruling on behalf of the Estate of ***** ("decedent") on whether the transfer of the decedent's interest in the "***** Revocable Trust" and in shares of an open-ended mutual fund incorporated in Massachusetts are subject to taxation under G.L. c. 65A, § 1.

The decedent executed a revocable trust in Massachusetts in 1992 and named herself and her two sons as trustees. These three individuals continued to serve as the trustees until the decedent died in 2001. The decedent was a United States citizen and a resident of the United Kingdom. Her two sons were citizens and residents of the United Kingdom. The decedent retained the right while living and competent to amend or revoke the trust at any time. The decedent amended the trust in 1992 and 1993. The trust provided for payments of the net income and principal as the decedent might from time to time request. In the absence of any such request, the trustees could pay or apply any part or all of the net income and principal, as they in their discretion, deemed advisable. Upon her death, the trust provided for distribution to her issue. In the event of a failure of beneficiaries, the trust provided the property would be distributed to those persons who would be entitled to receive the property had the decedent died intestate, unmarried, domiciled in Massachusetts and owning the property held in the trust. The trust provided that it would at all times be governed, construed and administered in accordance with the laws of the Commonwealth of Massachusetts.

At the decedent's death, the trust corpus consisted of shares of publicly traded corporations and cash in a money market account. Massachusetts corporations did not issue the publicly traded securities. All of the trust assets were held in an account at a brokerage firm, incorporated in Delaware, with offices throughout the United States including Massachusetts. Since the establishment of the trust, an employee in the Boston office of this brokerage firm serviced the account and executed transactions at the direction of the trustees. The shares of the publicly traded corporations were evidenced by electronic book entries through a trust company in New York in the name of the brokerage firm's nominee. The decedent also owned, in her own name, shares in an open-ended mutual fund operating in the form of a Massachusetts trust. All of the assets that are the subject of this ruling are intangible personal property.

The estates of certain decedents dying on or after January 1, 1997 are subject to Massachusetts taxation under the provisions of G.L. c. 65C, § 2A. The amount of the Massachusetts estate tax is based upon the credit for state death taxes allowable to a decedent's estate under Internal Revenue Code section 2011, as amended and in effect as of the date of the death of the decedent. The estate of a decedent who at the time of his/her death was a resident of the Commonwealth is taxed under G.L. c. 65C, § 2A(a). The estate of a decedent who at the time of his/her death was not a

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resident of the Commonwealth is taxed upon the transfer of real property situated in the Commonwealth and upon tangible personal property having an actual situs in the Commonwealth. G. L. c. 65C, § 2A(b). The decedent was not a resident of the Commonwealth at the time of her death and owned no real or tangible personal property in the Commonwealth. We rule the decedent's estate is not subject to taxation under G.L. c. 65C, § 2A.

The estates of some decedents are subject to taxation under the provisions of G.L. c. 65A, § 1. The third paragraph of the statute provides, in part, as follows:

A tax is hereby imposed . . . upon the transfer of all property, both real and personal, within the commonwealth of every person who at the time of death was not a resident of the United States, the amount of which shall be a sum equal to such proportion of the amount by which the credit allowable under the applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to the several states exceeds the amount so paid for such taxes, exclusive of estate taxes based upon the difference between such credit and other taxes and inheritance, legacy and succession taxes, as the value of the property in the commonwealth bears to the value of the entire estate, subject to estate tax under the applicable federal revenue act.

This paragraph was effective as of December 1, 1932 and existed during the time the Commonwealth imposed an inheritance tax under G.L. c. 65 and the estate tax under G.L. c. 65C.

The enactment of G.L. c. 65C, § 2A did not expressly repeal G.L. c. 65A, § 1. The issue arises of whether there was an implied repeal of G.L. c. 65A, § 1 by the enactment of G.L. c. 65C, § 2A. The long-standing rule of statutory interpretation was stated as follows in *Commonwealth v. Bloomberg*, 302 Mass. 349, 352 (1939): "As there is no express repeal, it is contended that there is a repeal by implication. Such repeals have never been favored by our law. Unless the prior statute is so repugnant to and inconsistent with the later enactment that both cannot stand, then the former is not deemed to have been repealed." "Where two statutes are alleged to be inconsistent, they are construed in a manner which gives reasonable effect to both statutes and creates a consistent body of law." *Boston v. Board of Education*, 392 Mass. 788, 792 (1984) citing *Goldsmith v. Reliance Ins. Co.*, 353 Mass. 99, 102 (1967). As stated above, the transfer of the decedent's estate is not subject to taxation under the provisions of G. L. c. 65C, § 2A(b) as that statute deals with the transfer of real property situated in the Commonwealth and *tangible* (emphasis added) personal property having an actual situs in the Commonwealth owned by a decedent who at the time of his/her death was not a resident of the Commonwealth. G.L. c. 65A, § 1 imposes a tax upon the transfer of all property, both real and personal, within the Commonwealth and owned by a decedent who at the time of his/her death was not a resident of the United States. This statute is not limited to tangible personal property having an actual situs in the Commonwealth in the manner that G.L. c. 65C, § 2A is limited to tangible personal property. The statutes tax the transfer of different types of personal property. The legislature did not expressly repeal G.L. c. 65A, § 1 by any statutory enactment and G.L. c. 65C, § 2A did not repeal it by implication. Therefore, it remains part of the system of the taxation of estates. The decedent was not a resident of the United States at the time of her death and owned personal property within the Commonwealth. We rule the transfer of the decedent's estate is subject to taxation under G.L. c. 65A, § 1.

The Supreme Judicial Court ("SJC") analyzed G.L. c. 65A, § 1 in *Frost v. Commissioner of Corporations & Taxation*, 363 Mass. 235 (1973), appeal dismissed 414 U.S. 803 (1973). The Court examined the transfer tax treatment of a United States citizen who resided outside the United States at the time of his death and owned only intangible personal property in Massachusetts that is similar to the decedent's property. In that case, Timothy P. Kuhn owned a joint interest in certain shares of stock held in a brokerage account with a firm located in Boston; stock, bonds and cash held in a brokerage account with another firm located in Boston; and cash on deposit with a bank located in Boston. Kuhn's executor did not contest that any of these interests were other than "property within the Commonwealth" for the purposes of G.L. c. 65A, § 1.

In upholding the constitutionality of the statute and in sustaining the Commissioner's tax

assessment, the SJC looked at the benefits and protections of the Commonwealth afforded the intangible Massachusetts assets. The cash on deposit in a Massachusetts commercial bank was protected by state supervision and regulation of that bank and by the laws of the Commonwealth concerning the obligations of the bank to its depositors. The securities and cash in brokerage accounts in Massachusetts were similarly held in circumstances where the law of the Commonwealth was protecting the interests of the decedent.

In the instant case, the activities of the brokerage firm and its Massachusetts employees and office from which the intangibles were managed are subject to registration, oversight and discipline by the Secretary of the Commonwealth (See Uniform Securities Act, G.L. c. 110A and 950 CMR 10.00, 12.00, 13.00 and 14.00). The Attorney General of the Commonwealth can pursue actions against brokerage firms and their employees for violations of G.L. c. 110A. Provisions of the Uniform Commercial Code also protect the securities and cash in brokerage accounts in Massachusetts (See G.L. c. 106, art. 8 concerning investment securities). The trustees could use Massachusetts courts to pursue remedies against the brokerage firm and its employees under the provisions of G.L. c. 110A, the consumer protection law (See G.L. c. 93A) and other statutory provisions. The decedent referred to the law of the Commonwealth regarding the descent and distribution of real and personal property, G.L. c. 190, in the event of a failure of beneficiaries pursuant to the trust instrument. She also specified the laws of the Commonwealth would govern the construction and administration of the trust. The trustees and the beneficiaries could utilize the benefits of the Massachusetts judicial system if necessary.

In *State Tax Commission of Utah v. Aldrich*, 316 U.S. 174 (1942), the Supreme Court examined the transfer tax treatment of certain shares of stock. The *Frost* Court cited this case in its opinion. In the *Aldrich* case, the State of Utah imposed a tax upon a transfer by death of shares of stock in a Utah corporation forming part of the estate of a decedent who, at the time of his death, was domiciled in the State of New York and held there the certificates representing those shares. The Court decided that the corporation owed its existence to Utah. Utah law defined the nature and extent of the interest of the shareholders in the corporation and afforded protection for those rights. Utah had power over the transfer by the corporation of its shares of stock. Jurisdiction to tax is not restricted to the domiciliary state in case of shares of stock. Another state which has extended benefits or protection or which can demonstrate the practical fact of its power or sovereignty as respects the shares may likewise tax the property. The test established in the *Aldrich* case and followed by the SJC in the *Frost* case is "that a State may constitutionally impose an inheritance tax in connection with the transfer of intangible personal property of a deceased nonresident if that State "has extended benefits or protection" with respect to property or "can demonstrate 'the practical fact of its power' or sovereignty" as respects the property." (*Frost, supra.* at 245.) Based on the facts presented in this request, the decedent owned shares in an open-ended mutual fund operating in the form of a Massachusetts trust. Massachusetts law controls the form of the business entity and the rights of the investors.

Based on the foregoing, we rule that the transfer of shares of the publicly traded corporations, the cash in a money market account and the interest in the open-ended mutual fund domiciled in Massachusetts are subject to tax under paragraph three of G.L. c. 65A, § 1. This result is not a matter of first impression and is consistent with the Department's interpretation of this law in other cases involving the estates of United States citizens who resided outside the United States.

The formula for computing the amount of transfer tax payable to Massachusetts by the estate of a person who was not a resident of the United States is contained in the third paragraph of G.L. c. 65A, § 1. It provides that the numerator of this fraction is the value of the decedent's property located in the Commonwealth and the denominator is the value of the decedent's property subject to federal estate tax. This fraction is the portion of the credit for state death taxes allowable to the estate pursuant to IRC § 2011 and the result is the transfer tax imposed by the Commonwealth. We rule the numerator of the fraction is the sum of the value of the securities of publicly traded securities and the cash in the money market fund in the brokerage account and the value of the open-ended mutual fund domiciled in Massachusetts. We rule the denominator of the fraction is the value of the decedent's property subject to federal estate tax.

Very truly yours,

/s/Alan LeBovidge

Alan LeBovidge
Commissioner of Revenue

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